

1988

## Barbara J. Motes v. Preston J. Motes : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 88-0015 IN THE COURT OF APPEALS OF THE STATE OF UTAH

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BARBARA J. MOTES,	:	
	:	
Plaintiff/Appellant,	:	
	:	
v.	:	Case No. 88-0015-CA
	:	
PRESTON J. MOTES,	:	Priority 14(b)
	:	
Defendant/Respondent,	:	
Cross Appellant.	:	

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APPELLANT'S REPLY BRIEF  
AND  
RESPONSE TO CROSS APPEAL

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AN APPEAL FROM A DECISION OF THE THIRD  
JUDICIAL DISTRICT COURT OF AND FOR  
SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE KENNETH RIGTRUP, JUDGE PRESIDING

---

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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Plaintiff/Appellant,	:	
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Defendant/Respondent,	:	
Cross Appellant.	:	

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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BARBARA J. MOTES,	:	
Plaintiff/Appellant,	:	Case No. 88-0015-CA
v.	:	
PRESTON J. MOTES,	:	Priority No. 14b
Defendant/Respondent	:	
Cross Appellant.	:	

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APPELLANT'S REPLY BRIEF  
AND  
RESPONSE TO CROSS APPEAL

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Pursuant to Rule 24(c) of the Rules of the Utah Court of Appeals, Plaintiff/Appellant, Barbara J. Motes, submits the following Reply Brief in response to the Brief of Respondent/Cross Appellant, Preston J. Motes.

STATEMENT OF THE CASE

This is a divorce case. As was stated in Appellant's initial Statement of the Case, it involves errors made by the trial court in the postponed division of Respondent's military pension benefits and the allocation of income tax exemptions between the parties. Respondent, in his cross appeal, claims error in the manner the trial court dealt with Appellant's inheritance and related appreciation.

### STATEMENT OF ADDITIONAL FACTS

Appellant relies on the Statement of Facts set forth in her principal Brief on pages 3 through 8, and the following additional facts which are pertinent to Respondent's cross appeal related to Mrs. Motes's inheritance and the manner in which the trial court dealt with it. Also, a correction should be made in the original Statement of Facts in that the parties were married for 20 years, not 17-1/2 years, as was initially stated. (See pages 1, 2 and 11 of Appellant's Brief.)

Mrs. Motes's father died in February of 1985 (Tr. 37) and left a will naming her as his only heir (Tr. 45). His estate consisted of approximately \$140,000.00 in cash (Tr. 38, 65). She received \$30,000.00 in February of 1985 (Tr. 65), and from that sum, the parties deposited \$5,000.00 for each of the four children into four separate accounts, one for each child. The remaining \$10,000.00 was applied towards family bills (Tr. 42). In December of 1985, an additional \$100,000.00 was received (Tr. 38), and from that each child was given another \$15,000.00 (\$60,000.00) (Tr. 69). The remaining amount was placed in a separate account for Mrs. Motes. (Mr. Motes said it was \$20,000.00 [Tr. 69]; however, Mrs. Motes said it was \$40,000.00 [Tr. 38].) In December, 1986, Mrs. Motes received an additional \$7,500.00 which was used to purchase a car for the parties' son

(Tr. 39), and a final \$3,000.00 was received in April or May of 1987 (Tr. 40).

Mr. Motes presented evidence relative to \$32,384.00 in appreciation he claimed had occurred on the total inheritance which he said he invested for the children and Mrs. Motes (Tr. 69). He did not distinguish the appreciation attributable to the \$80,000.00 in the children's accounts from the appreciation attributable to the remaining inheritance which Mrs. Motes retained in her account. Mr. Motes then asked that that total appreciation be considered as marital property in his overall proposed property distribution (Defendant's Exhibit 1), but he asked that Mrs. Motes be awarded that appreciation, with him to receive marital assets to offset the award of appreciation to Mrs. Motes.

Following trial, Mr. Motes's counsel prepared proposed Findings of Fact and Conclusions of Law and presented them to Judge Rigtrup. They were signed after the Court had made certain handwritten deletions and interlineations. The following paragraphs are exact reproductions of the Findings and Conclusions entered by the Court in relation to the inherited property issue.



14. The defendant invested a portion of the money inherited by the plaintiff and <sup>KR. those</sup> investments have produced earnings <sup>KR. approximately</sup> of \$32,384.00.

19. The plaintiff should be awarded all of the accounts of the children established with funds from the plaintiff's inheritance and the right and obligation to manage those accounts, and the defendant should be ordered to take appropriate steps to turn those over to the plaintiff.

26. The <sup>KR. approximate amount of</sup> \$32,384.00 earned ~~by the defendant through his~~ <sup>KR. on</sup> management of the property inherited by the plaintiff should be considered a non-asset of the marriage.

36. The court declares that it believes that it has divided the property of the parties with <sup>KR. approximately</sup> \$87,707.00 being awarded to the plaintiff and <sup>KR. approximately</sup> \$99,913.00 being awarded to the defendant. <sup>KR. exclusive of household furniture and goods and personal property not otherwise included,</sup> and the extra amount has been awarded to the defendant for financial services provided to the plaintiff and the marital estate.

37. The court has determined that it should award to the plaintiff the funds that she has inherited without counting that as part of the marital estate, although the defendant has requested that this be included for consideration purposes and that part of it, that is, the money that has been earned from the inheritance <sup>KR. in part</sup> through the management of the defendant be considered as a marital asset.

In summary, Judge Rigtrup found that Mrs. Motes's inheritance had appreciated in value \$32,384.00, but that that appreciation was not a marital asset, that Mrs. Motes should receive her inheritance, and the children should receive their accounts which were created from that inheritance, and that Mr. Motes should receive \$12,206.00 more in marital property to compensate him for any of his efforts attributable to increasing the value of the inheritance.

## SUMMARY OF ARGUMENTS

### POINT I

The cases relied upon by Mr. Motes in responding to Mrs. Motes's claim that Judge Rigtrup incorrectly deferred a division of monthly military retirement benefits either support Mrs. Motes's position or are clearly distinguishable from the facts of this case. Under Utah law, a trial court is required to consider retirement benefits as an asset of the marriage, and then make a fair and equitable distribution of that asset so that generally an equal division of the marital property is achieved. This did not occur in this case, and, consequently, Mr. Motes, over the five-year deferral period, will receive \$89,040.00 more in marital property than Mrs. Motes. (\$1,484.00/month x 12 months x 5 years) That inequitable distribution constitutes a major abuse of discretion and justifies a reversal on that issue.

### POINT II

#### TAX EXEMPTIONS

The recent decision of the Utah Court of Appeals in Martinez v. Martinez, 754 P.2d 69 (Ut. C.A. 1988), requires trial courts in Utah to award income tax exemptions attributable to minor children to the custodial parent in a divorce action unless one of the following exceptions exists.

- 1) The custodial parent voluntarily waives his or her right to claim the exemption;
- 2) There exists a multiple support agreement; or

- 3) The exemption had been relinquished by the custodial parent under a qualified pre-1985 instrument.

None of the above exceptions exist in this case; therefore, the trial court erred in not awarding Mrs. Motes all of the minor children as tax exemptions.

### POINT III

#### INHERITED PROPERTY

Mr. Motes's cross appeal on the issue of division of appreciation related to Mrs. Motes's inheritance is without merit for three separate reasons. First the trial court did consider the appreciation in the overall property distribution by awarding Mr. Motes \$12,206.00 more in marital assets than Mrs. Motes was awarded, and specifically stating why it was doing so. Second, Mr. Motes claims that the appreciation attributable to the entire inheritance should have been part of the marital estate, even though \$80,000.00 of the inheritance had previously been given to the parties' children by Mrs. Motes. Mr. Motes presented no evidence to show what portion of the claimed appreciation was attributable to Mrs. Motes's remaining share of the inheritance. And, third, the manner in which the trial court dealt with the appreciation issue in relation to the marital property, inherited property, alimony and child support issues was consistent and entirely in accord with the Utah Supreme Court's recent decision

in Mortensen v. Mortensen, 89 Utah Adv. Rep. 7 (Utah Sup. Ct., filed August 16, 1988).

#### ARGUMENT

##### POINT I

THE TRIAL COURT ABUSED ITS  
DISCRETION IN DEFERRING DIVISION OF  
THE HUSBAND'S MONTHLY MILITARY  
RETIREMENT BENEFITS FOR A PERIOD OF  
FIVE YEARS.

In order to prevail on this appeal, Appellant is required to show that the trial court, in making its distribution of property, misunderstood or misapplied the law, entered findings not supported by the evidence, or caused serious inequity so as to constitute an abuse of discretion. English v. English, 565 P.2d 409-410 (Utah 1977). Appellant recognizes that burden and states that it has been met.

In this case, Judge Rigtrup misunderstood and misapplied the law as it relates to issues of marital property and support and caused a serious inequity to Mrs. Motes by not awarding her the right to immediately receive the benefits from the major marital asset acquired by the parties during this twenty-year marriage--Major Motes's military retirement. This serious and material error constitutes an abuse of the trial court's discretion and its decision related to the parties' pension plan should be reversed.

Mr. Motes, in Point I of his brief, cites a number of Utah cases which stand for the proposition that a trial court can distribute a pension plan in any number of ways. Mrs. Motes agrees. However, common to each of those cases are the principles that any such distribution must be fair and equitable to both parties, and that an interest in a retirement plan acquired during a marriage, being marital property, must be distributed in a way so as to achieve general parity between the parties in the overall property distribution. In this case, Judge Rigtrup did not adhere to either of those principles and, by so doing, gave to Mr. Motes an additional \$89,040.00 (\$1,484.00/month x 12 months x 5 years) in marital property. Parenthetically, that sum does not include any cost of living or benefit increase that may occur during the five-year period.

In claiming that the five-year delayed division of the monthly military retirement benefits was correct, Mr. Motes relies primarily on the cases of Dogu v. Dogu, 652 P.2d 1308 (Utah, 1982), and Andersen v. Andersen, 85 Utah Adv. Rep. 17, to show the consistency of the trial court's decision with the decisions in these cases. These cases, however, are clearly distinguishable from the facts of the present case.

In the Dogu case, the parties divorced after a twenty-four-year marriage. The husband was fifty-six years old at the time of divorce and had a successful ongoing anesthesiology practice.

One of the disputed issues in Dogu focused on the division of the doctor's not yet received retirement account and the impact of that on the future support expectations of Mrs. Dogu.

In Dogu, the doctor husband had not retired at the time of the divorce and was not yet entitled to receive his monthly retirement benefits. His benefits, however, did have a fixed value at the time of trial. The trial court did not include the husband's retirement fund in the overall property distribution. Dr. Dogu agreed, claiming these funds should not be subject to division, even though they were acquired during the marriage. The Supreme Court disagreed and reversed and remanded on the retirement plan issue.

In so doing, the Supreme Court outlined a number of acceptable division alternatives available to the trial court, each of which focused on making certain that Mrs. Dogu received one-half of the retirement fund or an appropriate equivalent. Most importantly, however, all of the suggested approaches were intended to grant a wife half of the retirement fund when that fund became available to her husband.

In the Motes case, Mr. Motes contends that allowing him to keep the pension for five years before sharing it with the Plaintiff is consistent with Dogu. Mr. Motes fails to mention that none of the situations outlined by the Court in Dogu allow the husband to keep, and freely use this joint money for a period

of time prior to sharing whatever is left with his spouse. Dogu's suggested methods of division all involve directly sharing the benefits with the wife at the time the retirement fund is received by the husband, either by actually dividing the benefits or providing a substitute fund from which the wife would receive her share of the marital asset. Therefore, Dogu supports the position of Mrs. Motes in relation to the retirement issue.

Mr. Motes also relies on the case of Andersen v. Andersen, 85 Utah Adv. Rep. 17 (Utah Ct. App. June 22, 1988), and argues that it is a case having facts analogous to the present case and standing for the proposition that a deferred distribution of an equity interest in a marital residence is acceptable. Unfortunately, the facts of Andersen don't fit the facts of this case. In Andersen, the trial court ordered the marital residence to be sold two years from the decree, but allowed Mrs. Andersen to use it during those two years. When the house was sold, the proceeds were then to be divided equally between the parties. In so doing, Mrs. Andersen paid for her use of the asset by maintaining monthly expenses related to it, thereby protecting the asset for both parties. When the home was sold, each party was to share equally in any appreciation related to the asset during the two-year period -- admittedly, a fair way to handle that particular issue.

In this case, however, Mr. Motes gets to use the asset, contributes nothing to its maintenance, receives all its earnings for five years, while Mrs. Motes gets nothing but the child support she would have received even if the asset didn't exist. Mr. Motes meets his support obligation with a marital asset without "lifting a finger," or inconveniencing himself in any way whatsoever: all to the detriment of Mrs. Motes. That is unfair. It is inequitable. It is why Judge Rigtrup was wrong.

Doqu and Andersen do not support the Defendant's assertion that it was proper for the trial court to delay the division of Mr. Motes's pension, allow him to receive the monthly payments and then to pay his child support from those payments.

The trial court's decision on the military retirement payments should be reversed with any such reversal to include an order directing that Mrs. Motes receive her share of the monthly retirement payments that have been received since July 30, 1987-  
- the date this matter was tried.

## POINT II

POINT II OF RESPONDENT'S BRIEF DOES  
NOT CORRECTLY SET FORTH THE LAW IN  
UTAH RELATED TO WHO IS ENTITLED TO  
THE DEPENDENCY EXEMPTIONS IN A  
DIVORCE PROCEEDING.

Mr. Motes, in Point II of his brief, argues that this Court's decision in Martinez v. Martinez, 754 P.2d 69 (Ut. C.A. 1988), dealt only with the issue of whether or not there was a



"qualified pre-1985 instrument" so as to allow Dr. Martinez to claim two of the children as exemptions for federal income tax purposes. He goes on to suggest that the issue as to whether or not a trial court can allocate income tax exemptions to a non-custodial parent, vis-a-vis the federal statute which automatically grants the exemption to the custodial parent is still an "open question" in Utah. His suggestion is wrong. He has misconstrued and erroneously interpreted the holding in Martinez.

Like the trial court in the present case, the trial court in Martinez, supra, awarded Dr. Martinez, the non-custodial parent, two of the parties' three children as exemptions and ordered Mrs. Martinez to sign the required waivers. (In this case, Mr. Motes received one of the children as an exemption and the trial court ordered Mrs. Motes to sign the required waiver.)

Mrs. Martinez appealed that award, and claimed that she was entitled under federal law to claim all of the children as exemptions because she was the custodial parent and that the supremacy clause of the United States Constitution, in light of the 1984 Tax Reform Act and its effect on 26 USC Section 152 (Supp. 1988), prevents a state court from allocating tax exemptions between the parties to a divorce action.

This Court agreed with Mrs. Martinez and reversed the trial court on that issue, and as a matter of right, awarded her all

three exemptions. Dr. Martinez then petitioned the Utah Supreme Court for a Writ of Certiorari on the exemption issue in Martinez v. Martinez (Utah Supreme Court Case No. 880189, petition filed May 17, 1988).

In his petition, Dr. Martinez argued that 26 U.S.C. Section 152 does not limit the broad authority of a trial court in divorce actions to allocate tax exemptions, but only requires that a custodial parent sign a written declaration stating he or she will not claim the child as a dependent. He went on to argue that federal law further does not prohibit a state court from determining an equitable distribution of the tax exemptions and ordering a custodial spouse to execute the required form if it chose to award an exemption to the non-custodial parent.

This is the same argument now being made by Mr. Motes. The Utah Supreme Court denied Dr. Martinez's Petition for Writ of Certiorari on the exemption issue on October 4, 1988.

Mr. Motes has attempted to argue that in spite of the holding in Martinez, supra, the law in Utah is still unsettled in regard to the Court's power to allocate income tax exemptions in divorce actions. To the contrary, Martinez very clearly sets forth the law on exemptions in Utah when Judge Davidson wrote:

. . . Plaintiff requested the tax exemptions for all three children but the trial court's order did not honor that request. This result is contrary to the general provisions of section 152(e). Any argument that the stipulation and separation agreement

qualifies as a pre-1985 instrument where plaintiff willingly relinquishes her right to the exemptions under federal law, neglects plaintiff's rejection of its terms in the post-divorce period. By amending her complaint, plaintiff modified and affirmatively rejected the pre-divorce distribution. Plaintiff is entitled to the tax exemptions for all of the children in view of the award of custody to her and the failure of defendant to establish any exception to the general rule stated above. Id. at 754 P.2d 69, 72. (Emphasis added.)

In Martinez, the decree required Mrs. Martinez to execute the necessary waiver to allow her husband to claim two of the three children. That mandate of the trial court was considered by the Court of Appeals and specifically rejected by concluding that none of the three exceptions to section 152(e) existed and therefore the trial court erred in awarding Dr. Martinez any of the exemptions whatsoever.

In spite of the very clear language in Martinez, Mr. Motes argues that two lines of reasoning have emerged from the states who have been presented with the issue and that Utah has not adopted either. The first concludes that the federal statute is controlling and state courts cannot order a custodial parent to execute a waiver, while the second line concludes state courts can make such an order. (See page 15 of Respondent's Brief.)

Mr. Motes's attempt to argue that the second approach is the better approach is without merit in that this Court has already elected to follow the first approach and award the exemptions to

the custodial parent and thereby give priority to the federal statute and the supremacy clause of the United States Constitution. That is the clear conclusion of Martinez, and consequently the law in Utah.

Point II of Respondent's Brief is without merit.

### POINT III

THE TRIAL COURT DID NOT ABUSE ITS  
DISCRETION IN AWARDING PLAINTIFF  
HER INHERITANCE AND ITS  
APPRECIATION AS HER SOLE AND  
SEPARATE PROPERTY.

In the cross appeal filed by Mr. Motes, he argues that "the trial court erred in refusing to consider the appreciation in the Plaintiff's inheritance as an asset which should be considered in dividing the property between the parties" (Respondent's Brief, p. 21). That argument is flawed in three separate ways, each being fatal in and of itself.

First, the trial court did consider the appreciation related to any inheritance received by Mrs. Motes by awarding Mr. Motes more marital property than Mrs. Motes in the overall property distribution.

Second, Mr. Motes claim an interest in the appreciation attributable to the entire inheritance, even though \$80,000.00 of it had earlier been given to the parties' children and therefore, was not part of the marital estate.

Third, Mr. Motes presented no evidence as to what portion of the appreciation was attributable to that part of the inheritance which Mrs. Motes retained and in spite of that, the trial court gratuitously gave him credit for his claim investment expertise and efforts.

The most current statement of the law in Utah as to how gifted and inherited property is to be handled in divorce actions is found in the case of Mortensen v. Mortensen, 89 Utah Adv. Rep. 7 (Utah Sup. Ct., filed August 16, 1988). Respondent has incorrectly cited this case as support for the argument he attempts to make in Point III of his brief. (See Respondent's Citation of Supplemental Authority, dated September 29, 1988.)

In fact, Mortensen supports Mrs. Motes's claim that the trial court considered the inheritance and related appreciation and the efforts Mr. Motes claimed he expended in connection with that appreciation in relation to its overall property and debt distribution and its award of alimony and child support.

In writing for the majority in Mortensen, Justice Howe set forth what the law in Utah is on gifted and inherited property.

We conclude that in Utah, trial courts making "equitable" property division pursuant to section 30-3-4 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement

of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, Dubois v. Dubois, supra, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. Cf. Jespersen v. Jespersen, 610 P.2d 326 (Utah 1980). An exception to this rule would be where part or all of the gift or inheritance is awarded to the nondonee or nonheir spouse in lieu of alimony as was done in Weaver v. Weaver, supra. The remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equality. Teece v. Teece, 715 P.2d 106 (Utah 1986). However, in making that division, the donee or heir spouse should not lose the benefit of his or her gift or inheritance by the trial court's automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to offset the gifts or inheritance. Any significant disparity in the division of the remaining property should be based on an equitable rationale, other than on the sole fact that one spouse is awarded his or her gifts or inheritance. The fact that one spouse has inherited or donated property, particularly if it is income-producing, may properly be considered as eliminating or reducing the need for alimony by that spouse or as a source of income for the payment of child support or alimony (where awarded) by that spouse. Such property might also be utilized to provide housing for minor children or utilized in other extraordinary situations where equity so demands. These rules will preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property. It also accords with the normal intent of donors or deceased persons that their gifts and inheritances should be kept

within their family and succession should not be diverted because of divorce.

Id at 9 and 10.

In addition, after reading the transcript of the trial court' ruling from the bench (Tr. 23-35, Vol. II), the Findings of Fact and Conclusions of Law and the Decree of Divorce (R. 190-216), and Point III of Respondent's Brief (p. 19), it becomes very apparent that Mr. Motes has absolutely no basis to claim that the trial court did not consider the appreciation which was related to the inheritance Mrs. Motes received in 1985. To the contrary, it did consider that claim, as is shown by the following excerpts from the Findings and Conclusions.

8. In February, 1985, the plaintiff's father died. When the parties went to the home that he had occupied, they found and removed from the home \$30,000.00 in cash. The plaintiff's father made plaintiff his sole heir and she has inherited the said \$30,000.00 in cash at the time of her father's death, \$100,000.00 in December, 1985; \$7,500.00 in November, 1986; and \$3,000.00 in December, 1986, for a total of \$140,500.00. The estate has not been finally distributed, but most of it has been disbursed. (R. 192, Findings.)

9. After the parties removed the \$30,000.00 from the plaintiff's father's home, \$20,000.00 was given to the defendant by the plaintiff to invest for their children and accounts were opened up in the sum of \$5,000.00 for each of the four children of the parties. After the \$100,000.00 payment had been received, an additional \$10,000.00 was set aside for each of the children of the parties. There are, now, \$15,000.00 plus earnings in the accounts of each of the

children of the parties for a total of \$60,000.00 plus earnings. (R. 192, Findings.)

. . .

14. The defendant invested a portion of the money inherited by the plaintiff and those investments have produced earnings approximating \$32,384.00. (R. 200, Conclusions.)

. . .

19. The plaintiff should be awarded all of the accounts of the children established with funds from the plaintiff's inheritance and the right and obligation to manage those accounts, and the defendant should be ordered to take appropriate steps to turn those over to the plaintiff. (R. 200, Conclusions.)

. . .

26. The approximate amount of \$32,384.00 earned on the property inherited by the plaintiff should be considered a non-asset of the marriage. (R. 201, Conclusions.)

. . .

36. The court declares that it believes that it has divided the property of the parties with approximately \$87,707.00 being awarded to the plaintiff and approximately \$99,913.00 being awarded to the defendant, exclusive of household furniture and goods and personal property not otherwise included, and the extra amount has been awarded to the defendant for financial services provided to the plaintiff and the marital estate. (R. 203-4, Conclusions.)

37. The court has determined that it should award to the plaintiff the funds that she has inherited without counting that as part of the marital estate, although the



defendant has requested that this be included for consideration purposes and that part of it, that is, the money that has been earned from the inheritance in part through the management of the defendant be considered as a marital asset. (R. 204, Conclusions.)

For some inexplicable reason, and in spite of these Findings and Conclusions, Mr. Motes now argues that he received nothing from the trial court for the efforts he claimed he expended in investing and managing Mrs. Motes's inheritance. Consequently, he argues that he's now entitled to share in the appreciation of all the inherited money, regardless of whether its Mrs. Motes's or the children's.

In fact, those efforts and any appreciation was specifically considered by the Court by its award to Mr. Motes of \$12,206.00 more in marital property than it awarded to Mrs. Motes with a very clear explanation as to why the Court was doing what it did.

Given the Findings and Conclusions set out above and the specific allocation of marital property which gave Mr. Motes \$12,206.00 more than Mrs. Motes, how can he now in good faith argue that

. . . the trial court erred in refusing to consider the appreciation in the plaintiff's inheritance as an asset which should be considered in dividing property between the parties.

p. 21, Respondent's Brief.

The answer to that question is possibly found on page 23 of the Respondent's Brief, when he states

In this case the defendant [Mr. Motes] decided to ask the court to rule on the division of the appreciation in the inheritance only after the plaintiff had already appealed the case to this court. Id.

The decision of the trial court in the inheritance and related appreciation issue is correct and falls squarely within the broad discretion of the trial court to fashion remedies which can best fairly fit the facts of the case before it. Here the Court returned to Mrs. Motes her inheritance and any appreciation related to what she retained, gave Mr. Motes a \$12,000.00 credit, awarded alimony of \$1.00 per year to each and awarded minimal child support -- all of which is consistent with the holding, approach and concepts set forth in Mortensen, supra.

Mr. Motes's cross appeal on this issue is without merit and should be denied. Further, when the statement appearing on page 23 of his brief is considered in light of the record and the clear findings of the trial court, Mrs. Motes's request for attorneys' fees and costs related to this appeal and cross appeal should be granted.

#### CONCLUSION

The trial court abused its discretion in the manner it dealt with Mr. Motes's military retirement benefits and, consequently, gave to Mr. Motes, over a five-year period, approximately \$89,000.00 more than Mrs. Motes will receive from that asset. That portion of Judge Rigtrup's decision should be reversed and

remanded with instructions to divide the pension plans of the parties using an appropriate formula for division, such as the one suggested in Woodward v. Woodward, 656 P.2d 431 (Utah 1982), and reimburse Mrs. Motes for her share of the monthly retirement benefits received by Mr. Motes since July 30, 1987.

The recent decision of Martinez v. Martinez, supra, requires that Judge Rigtrup's award of the income tax exemption for one of the minor children to Mr. Motes be reversed on the grounds that federal law in effect at the time of trial requires that the custodial parent receive the exemptions unless certain exceptions can be shown, none of which are present in this case. Mrs. Motes is entitled to claim all three children as exemptions, commencing with the 1987 tax year.

The cross appeal of Mr. Motes on the issue of appreciation related to Mrs. Motes's inheritance is without merit. The findings clearly show that the trial court did consider appreciation related to that inheritance by awarding Mr. Motes \$12,000.00 more in marital assets than Mrs. Motes in order to compensate him for the services he claimed he rendered in connection with that appreciation. That portion of Judge Rigtrup's decision should be affirmed.

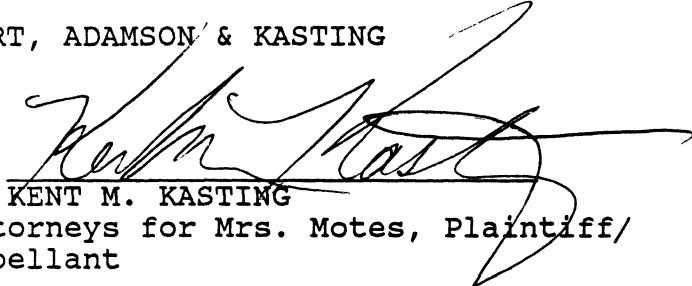
Finally, an award of attorneys' fees and costs on appeal to Mrs. Motes is appropriate for two reasons. First, because the trial court incorrectly adopted an "income stream" theory urged

by Mr. Motes in relation to the military retirement when it should have been treated as property and divided at the time. Mrs. Motes had no other option than to appeal. She should not be required to bear those costs. Second, Mr. Motes's cross appeal is without merit and evidently was filed only because Mrs. Motes appealed the retirement issue. (See p. 23 of Mr. Motes's brief.) The costs of addressing that issue should not be borne by Mrs. Motes nor should Mr. Motes's cavalier approach to that issue be sanctioned by this Court.

RESPECTFULLY SUBMITTED this 24th day of October, 1988.

DART, ADAMSON & KASTING

By

  
KENT M. KASTING

Attorneys for Mrs. Motes, Plaintiff/  
Appellant

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies of the above and foregoing Appellant's Reply Brief and Response to Cross Appeal were duly hand delivered, addressed to:

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DATED this 24th day of October, 1988.